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IN THE

Supreme Court of the United States

October Term, 1976
Nos. 76-1121, 76-1153 and 76-1162

No. 76-1121

AMERICAN BROADCASTING COMPANIES, INC., CBS INC. and NATIONAL BROADCASTING COMPANY, INC.,
Petitioners,

vs.

WRITERS GUILD OF AMERICA, WEST, INC.,
Respondent.

No. 76-1153

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,
Petitioner,

vs.

WRITERS GUILD OF AMERICA, WEST, INC.,
Respondent.

No. 76-1162

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WRITERS GUILD OF AMERICA, WEST, INC.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

Brief for American Broadcasting Companies, Inc., CBS Inc. and National Broadcasting Company, Inc.

CHARLES G. BAKALY,
Attorney for Petitioners American Broadcasting Companies, Inc., CBS Inc., and National Broadcasting Company, Inc.

Of Counsel:
O'MELVENY & MYERS,
RICHARD N. FISHER,
GORDON E. KRISCHER,
STEVEN C. BABB,
611 West Sixth Street,
Los Angeles, Calif. 90017.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

Brief for American Broadcasting Companies, Inc., CBS Inc. and National Broadcasting Company, Inc.

OPINIONS BELOW

The decision and recommended order of the Administrative Law Judge and the decision of the National Labor Relations Board (hereafter "Board") are reported at 217 N.L.R.B. 957. The decision of a divided panel of the court of appeals, which denied enforcement to the Board's order, is not yet officially reported but is unofficially reported at 93 L.R.R.M. 2958.*

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1976. The petition for a writ of certiorari in No. 76-1121 was filed on February 11, 1977, and the petitions for writs of certiorari in Nos. 76-1153 and 76-1162 were filed on February 22, 1977. These petitions were granted on April 25, 1977, and the cases were consolidated. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does a labor union violate Section 8(b)(1)(B) of the National Labor Relations Act (hereafter "Act") by disciplining, through substantial fines and blacklisting, those supervisor members and managerial members vested with grievance adjustment or collective bargaining authority who perform solely their normal supervisory and managerial duties during a strike by said union against their employer?

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*Each of the opinions below is also set forth in Appendices A, B and C, respectively, to the petition for a writ of certiorari filed by petitioners American Broadcasting Companies, Inc., CBS Inc. and National Broadcasting Company, Inc. (hereafter collectively referred to as the "Networks") in No. 76-1121.

STATUTES INVOLVED

The relevant provisions of the Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*), are as follows:

Section 2. When used in this Act—

* * *

(3) The term "employee" shall include any employee, * * * but shall not include * * * any individual employed as a supervisor * * *.

* * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * *

Section 8 * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * *

Section 14.

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

STATEMENT

Statement of Facts

The Networks' Management and Supervisory Personnel

The Networks comprise a multi-employer unit for the purpose of collective bargaining with the Respondent, Writers Guild of America, West, Inc. (hereafter "Guild"). Until March 4, 1973 the Networks and the Guild were parties to a collective bargaining agreement entitled "Writers Guild of America Theatrical and Television Film Basic Agreement of 1970-Networks" (hereafter "WGA-Network Film Agreement"). (A. pp. 314-80.)* This agreement covered employees who rendered writing services in the preparation of materials for tape and motion picture film programs broadcast by the Networks.**

At all times relevant hereto, the Networks employed as supervisory and management personnel, executive producers, associate producers, producers, directors and executive story consultants (also known as story editors or executive story editors). Some of the persons so employed by the Networks were also Guild members (A. pp. 9-10, 21-22), having voluntarily retained their membership while performing management services since individuals in the entertainment industry frequently interchange between writer and managerial posi-

*The designation "A. pp. 314-80" refers to pages 314-380 in the two volume appendix filed with petitioners' briefs. Similar designations will be used throughout this brief.

**Freelance writers who wrote material for live television programs were covered by an essentially identical separate agreement between the Networks and the Guild which expired February 13, 1973. (G.C. Ex. 10.) "G.C. Ex. 10" refers to Exhibit 10 introduced into evidence by the General Counsel. Similar designations will be used throughout this brief. This exhibit was part of the record before the court below but was not printed in the appendix before this Court.

tions.* The WGA-Network Film Agreement expressly excludes these supervisory classifications from the bargaining unit and the union security clause. (A. p. 317.)**

Executive producers, producers, directors and executive story consultants together constitute the primary management group of any television or motion picture production unit. Their services are expressly excluded from the coverage of the WGA-Network Film Agreement, even if they perform incidental writing services such as cutting script material to keep a program within its prescribed time limits and the writing of "bridging" material necessitated by said cuts, changes in technical or stage directions, script revisions necessary for legal clearance and series continuity acceptance, minor changes in dialogue, script changes necessitated

*Persons who are employed in these management and supervisory positions and who have retained their Guild membership are frequently referred to within the entertainment industry as "hyphenates." This term reflects their dual capabilities and past services (*e.g.*, writer-producer, writer-director, writer-executive), or in some cases their dual or multiple guild memberships, but does not denote their actual capacities or duties. (Tr. 383-84, 584-85, 642, 670-72, 752.) "Tr." refers to the pages of the Transcript of Hearing before the Administrative Law Judge which were part of the record before the court below but which were not printed in the appendix before this Court. The term "supervisor-member," which is used in this brief to conform with the Court's teminology in *Florida Power & Light Co. v. I.B.E.W. Local 641*, 417 U.S. 790 (1974) is synonymous with "hyphenates" for purposes of this discussion.

**Other supervisory and management personnel of the Networks who may retain Guild membership include producer-directors, research directors, executive assistants to the vice-president, vice-presidents for program production, vice-presidents for production, vice-presidents for program development, general programming executives and managers of film programs. (A. pp. 9-10, 21.) However, all of the supervisor-members against whom the Guild assessed penalties held one of the job titles set forth in the text. The Guild expressly conceded that hyphenates other than story editors are supervisors within the meaning of §2(11) of the Act and adjust grievances other than those of writers. (A. p. 590.)

by unforeseen contingencies, and, in certain circumstances, any changes in dialogue, narration or action so long as such changes are not "significant" revisions in plot, story line or interrelationship of characters. Such incidental writing services are known in the industry as the "(a) through (h)" services. (A. pp. 317-18, 322-23.)

The executive producer and producer have complete budgetary and creative authority, responsibility and control over the entire production process and all production personnel from idea inception through final post-production and marketing. (Tr. pp. 547-48, 838-40.)

The executive story consultant works with the executive producer and the producer in selecting writers and in evaluating and revising screenplays. The executive story consultant has the authority effectively to recommend both the hiring and discharge of writers. (A. pp. 132-33.) The executive story consultant also has broad authority in resolving grievances of writers who are working under his direction (A. pp. 121-22, 132-33), including disputes as to the necessity for, and creative approach to, a rewrite (A. pp. 34-35), and the assignment of credits. (A. p. 109.) If a writer is not satisfied with the executive story consultant's disposition of a grievance, the producer will be called upon to adjust the matter. (A. pp. 40-41.)

The ability of executive producers, producers, and executive story consultants to attract, work harmoniously with, and retain skilled writers is essential to the performance of their own duties, and determines in large part their own employment value to present and future employers. (A. pp. 50-51; Tr. pp. 690-92, 844-47.)

Once the script has been finalized, the executive producer and producer determine the location where each segment is to be filmed, select the director for each program segment, and, in consultation with the

director, determine which actors and other personnel to hire. (A. pp. 123-24.)

When an episode is to be shot on location outside of the Southern California area, the producer is responsible for making the local labor arrangements, including the negotiation of collective bargaining contracts and personal service contracts. (A. p. 127.) He is also responsible for overseeing and determining the budget for such matters as transportation, accommodations, wardrobe, and makeup. (Tr. p. 558.)

During the period when a program is being filmed, the director is in immediate charge of all employees on the set, while the producer or executive producer generally supervises the direction, frequently meeting with the director to view the "dailies" (freshly developed film footage) and to discuss the film's progress. (A. p. 124.) The executive producer and producer have final authority as to the content of the final print. (A. p. 124.)

The producer and executive producer have extensive responsibility and authority in resolving grievances on a daily basis (A. pp. 31-32, 45-46, 62-63, 73-74, 124-26, 153-54), including claims by extras for additional pay (A. p. 93), grievances concerning the adequacy of dressing room facilities, wardrobe, and transportation (A. p. 94, 156), jurisdictional disputes (A. p. 32), creative differences between editors and writers (A. p. 73) and other grievances involving writers. (A. pp. 40-41.)

Associate producers employed by the Networks have primary responsibility for supervising the post-production process, including the printing and editing of all film footage. (A. pp. 128-29.) The associate producer thus represents the employer in resolving employee grievances and dealing with the daily problems raised

by the unions representing the employees under his supervision. (A. pp. 129-30.)

The Guild's Strike Rules and Policies

In late February of 1973, the Guild prepared, published and distributed to all members, including the Networks' supervisor-members discussed hereinabove, its "Rules for the Conduct of Members During a Strike." (A. pp. 11, 15-20, 21.) The Rules were expressly made applicable to the supervisor-members:

> "24. All members, regardless of the capacity in which they are working, are bound by all strike rules and regulations in the same manner and to the same extent as members who confine their efforts solely to writing." (A. p. 19.)

Other rules reinforced this principle. For example, Rule 14 provides that during a strike members may not read or study any script or literary material "which might have any actual or potential connection with future employment of said members *as writers or otherwise* . . ." and Rule 19 provides that a member may not conduct negotiations with a struck production company for financing a production "or for his participation in such production *in any capacity*." (A. pp. 17-18; emphasis supplied.) Rule 26 provides that the term "member" as used throughout the rules encompasses anyone admitted to the Guild membership, even if on inactive or withdrawn status. (A. p. 19.)

The Rules prohibit not only the performance of writing services, but also the crossing of a picket line for any purpose (Rule 12; A. p. 17), the purchase of literary material (Rule 11; A. p. 17), the hiring of any writers on behalf of a struck employer (Rule 25; A. p. 19), entering the premises of a struck employer to view any film in production (Rule 13; A. p. 17), and any "conduct tending to defeat a strike or in any way weaken its effectiveness." (Rule 1; A. p. 15.)

As punishment for the offenses just described, the Rules provide for suspension or expulsion from Guild membership, censure, and fines (Rule 29; A. p. 20), and also for blacklisting:

> "30. No member shall work with any individual, including a writer-executive who has been suspended from Guild membership by reason of his violation of strike rules, or who has been found by the Council to have violated strike rules, in the event no disciplinary action was instituted against such person." (A. p. 20.)

By letter dated February 9, 1973, the Guild's Executive Director Michael H. Franklin scheduled a "special meeting of Hyphenate members" of the Guild for February 15, 1973, in order to discuss "those matters which Hyphenate members consider pertinent" with respect to the negotiations and possible strike action. (Assoc. Ex. 1.)* On February 15, 1973, between 100 and 140 supervisor-members assembled in response to this notice (A. p. 87), and were told by Franklin that the Guild's Strike Rules applied to them as members irrespective of their actual capacities, and that they were forbidden to perform services of any kind during a strike. (A. pp. 11, 88.)

The Guild's Constitution and By-Laws provide that no resignation of membership is effective until accepted by the governing Council of the Guild, and that the

*"Assoc. Ex. 1" refers to Exhibit 1 introduced into evidence by petitioner Association of Motion Picture and Television Producers, Inc. (hereafter "Association"). Similar designations will be used throughout this brief. The exhibit was part of the record before the court below but was not printed in the appendix before this Court.

Council may refuse to accept a tender of resignation and may instead "require the member either to continue his membership for a designated period not to exceed two years or to be expelled in bad standing." (Art. IV, Sec. 7; A. p. 397.) At all times relevant hereto, the Guild had a policy of not permitting any member to resign from its membership during the pendency of collective bargaining negotiations with the Networks and for at least six months after the conclusion of such negotiations. (A. p. 579.) This policy was implemented in these cases when the Guild refused to accept the resignation of a supervisor-member who attempted to resign shortly before the strike. (A. pp. 559-60.)

The Strike and Related Threats and Disciplinary Proceedings

In late February of 1973, representatives of the three Networks met and determined that during the anticipated Guild strike the Networks would not require any of their supervisory personnel to perform writing services, and so advised their personnel. (A. pp. 177-78.) For example, on March 28, 1973, the President of CBS Television Network sent a memorandum entitled "Writers Guild Negotiations" to all supervisory personnel in which he reviewed the progress of negotiations and the threats by the Guild, and concluded as follows:

> "In the event of a strike and/or the establishment of any picket line, we will expect you to continue to perform as a member of our management team and continue to report for work. If you are a member of the Writers Guild, such membership will not relieve you of your supervisory obligations to us but should the Guild attempt to fine you for performing your supervisory obligations to us and institute proceedings to impose such fines, CBS will provide you with a defense to any such proceedings at our cost and will indemnify you against any such fines imposed in such proceedings.
>
> "You realize that CBS must and will preserve all of its legal rights and remedies if you are in breach of contract or otherwise fail to render your services as a supervisor.
>
> "We undertake this course of action with regret, but we simply must fulfill our contractual and moral obligations." (A. pp. 531-32.)

On March 29, 1973, the Guild called an economic strike against the Networks, which was to last almost four months, and established picket lines at the premises of each employer. (A. pp. 11, 22.)

On April 9, 1973, the Guild mailed to each of its members a bulletin entitled "Strike and Discipline" (Assoc. Ex. 6), in which the Guild reported that it planned to institute disciplinary proceedings against certain unnamed supervisor-members who were suspected of violating strike rules.

Commencing in late February 1973, various officers and agents of the Guild telephoned numerous supervisor-members and threatened that if they failed to support the strike no Guild member would work with them or perform services for them at any time in the future. (A. pp. 122-23, 147, 157-58.)

On April 14, 1973, the Guild formally charged John Mantley, Executive Producer for CBS, with violations of Guild Strike Rules 1, 12 and 13, for having

crossed a Guild picket line during the strike. (A. pp. 308-10.) The Guild concurrently charged seven other supervisor-members employed by Association member-companies and by an independent production company with similar offenses. None was charged with violating any of the many Rules which relate to the performance of bargaining unit work.

Also on April 14, 1973, the Guild issued a press release in which it announced the aforementioned charges, and added the following statement:

> "Those convicted will appear on a 'Roll of Dishonor'—according to Guild officials, and be listed in Guild publications 'in perpetuity so that Guild members for years to come will never forget.' A Guild spokesman characterized those members guilty of scabbing as 'pariahs who have betrayed their colleagues.'" (A. p. 561.)

This statement was immediately quoted in news articles appearing in the *Los Angeles Times* (A. p. 564) and in the two motion picture-television daily trade newspapers, *Daily Variety* (Assoc. Ex. 4(c)) and the *Hollywood Reporter*. (A. p. 562.)*

By letter dated May 7, 1973, the Guild advised each of its members that its Board of Directors had on April 30, 1973, "rescinded" Strike Rule 30 which had provided for blacklisting of members who violated any Strike Rule. (A. pp. 568-69.) The May 7 letter admitted that Rule 30 "carries the odious implications

*The Guild's Strike Rule 22 provided in relevant part that "A member is chargeable with knowledge of . . . any strike information made known to the entertainment industry through any recognized means of communication such as trade papers, newspapers. . . ." (A. pp. 18-19.)

of a 'black list.'" On May 10, 1973, the Guild caused a news article to be published in the *Hollywood Reporter*, which added the following qualifications to the purported rescission:

> "A guild official who participated in the board revocation of rule 30 said yesterday he was not certain whether plans for the roll of dishonor would be abandoned in view of the action to avoid the appearance of blacklisting.
>
> "'What it does affect,' he noted, 'is the rule itself which would make it mandatory, and that, of course, was what the letter [rescinding Rule 30] was all about.'" (A. p. 537.)

On June 11, 1973, the Guild conducted an intra-union disciplinary hearing on the charges against John Mantley described hereinabove. The only evidence presented at the hearing with respect to the nature of the services performed by Mantley during the strike was Mantley's uncontradicted declaration that "neither I nor any of my production office staff have performed any writing functions whatosever," and a declaration to the same effect by the director of the same show. (G.C. Ex. 16N; Resp. Ex. 1 attached thereto.)* The Guild stipulated at the hearing in the instant cases that it prosecuted the disciplinary cases against the supervisor-members without regard to the nature of the services performed by them behind the picket lines. (A. pp. 160-61.)

*"Resp. Ex. 1" refers to Exhibit 1 introduced into evidence by the respondent Guild. Similar designations will be used throughout this brief. This exhibit was part of the record before the court below but was not printed in the appendix before this Court.

On June 25, 1973, the Board of Directors issued its Decision and Order in the Mantley matter. It found that Mr. Mantley had been given full and timely notice of the Guild's Strike Rules and of the fact that his employer was being struck, and that he "nevertheless crossed a Guild picket line and entered the struck premises of CBS Studio Center to perform services, in violation of the Rules. . . ." It then ordered that he be expelled from Guild membership effective immediately, and that he be fined $50,000 plus the costs of the hearing. (G.C. Ex. 17f.)

Immediately thereafter, the Guild issued a press release concerning its discipline against Mantley and four other hyphenates which resulted in articles appearing on June 27, 1973, in the *Los Angeles Times* (headlined "WRITERS GUILD FINES, EXPELS 5 WHO CROSSED PICKET LINES") (A. p. 533); the *Hollywood Reporter* (headlined "WGA OUSTS FIVE; FINES MOUNT UP TO $127,000") (A. p. 536); and *Daily Variety* (headlined "WGA FINES, OUSTS 5 HYPHENATES—50G Slapped on Mantley, Victor; 25G for Blees; Some Say They Won't Pay"). (A. pp. 534-35.)

Subsequently the Guild filed notices of disciplinary hearings and charges against numerous other supervisor-members employed by the Networks charging each with having crossed the Guild's picket line during the strike. (G.C. Ex. 15e, 15f, 21, 22.)

Pursuant to the internal rules of the Guild, John Mantley had, on July 20, 1973, filed a notice of

appeal to the full Guild membership of the decision of the Guild's Board of Directors. (G.C. Ex. 23c.) The Guild scheduled a general membership meeting for November 12, 1973, in order to hear the appeal of Mantley and eight other supervisor-members. (A. p. 582.)

On or about October 26, 1973, the Guild mailed to each of its members a bulletin which detailed the discipline which the Guild's Board of Directors had imposed against Mantley and others, notified the membership concerning the scheduled November 12, 1973 meeting, and explained the effects of expulsion from the Guild. (A. p. 582.) That bulletin included the following statement:

> "There is obviously a stigma attached to expulsion which might cause individual members of the Guild to refrain from working with such a person." (A. p. 540.)

This statement was repeated by the Guild in a bulletin dated November 12, 1973, and distributed to all members who attended the membership meeting of that same date. (G.C. Ex. 24.)

At the November 12, 1973 general meeting, the Guild membership voted to reduce the fine against Mantley from $50,000 to $3,883.48 and to set aside his expulsion from membership. The penalties of the other appealing hyphenates were similarly reduced. Charges against several of the remaining accused supervisor-members employed by the Networks were held in abeyance pending the outcome of the instant litigation. (A. pp. 583-84.)

The Decision of the Board

Based on the foregoing facts, the Board determined that the Guild's conduct violated § 8(b)(1)(B). Shortly before the instant case came before the Board, the Court held in *Florida Power & Light Co. v. I.B.E.W., Local 641*, 417 U.S. 477 (1974) that union discipline of supervisor members who perform solely rank-and-file struck work during a strike does not violate § 8(b)(1)(B) because such discipline does not "adversely affect" the supervisor-members' future performance of grievance adjusting or collective bargaining. In the instant cases, however, the Board found that the supervisor-members performed solely supervisory work during the Guild's strike. Applying *Florida Power*'s test, the Board concluded that the Guild's discipline would have the likely and probable effect of adversely affecting the supervisor-members' future performance of grievance adjusting or collective bargaining on behalf of their employer.*

Member Fanning dissented from the Board's decision for the same reasons set forth in his dissenting opinion in *New York Typographical Union No. 6 (Triangle Publications, Inc.)*, 216 N.L.R.B. 896, 897 (1975). In Fanning's view, the type of work actually performed by supervisor-members who cross picket lines is irrelevant under the Court's decision in *Florida Power*.

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*The Board referred to the rationales set forth in two of its earlier cases decided after *Florida Power*, *Chicago Typographical Union No. 16 (Hammond Publishers, Inc.)*, 216 N.L.R.B. 903 (1975), *enforced, Chicago Typographical Union No. 16 v. NLRB*, No. 75-1320 (C.A.D.C. June 21, 1976), *petition for cert. filed*, 45 U.S.L.W. 3385 (Nov. 16, 1976) and *New York Typographical Union No. 6 (Triangle Publications, Inc.)*, 216 N.L.R.B. 896 (1975), in reaching this conclusion.

The Decision of the Court of Appeals

On a petition for review filed by the Networks (with the Association intervening) and an application for enforcement filed by the Board (with the Networks intervening), a divided panel of the Court of Appeals for the Second Circuit denied enforcement of the Board's order. In a brief *per curiam* opinion, the majority of the panel held that "[f]or substantially the reasons set forth in the dissenting opinion of Board Member John H. Fanning . . . the Board as a matter of law incorrectly applied Section 8(b)(1)(B) to the instant case," citing *Florida Power*. (Networks' Pet. App. C-3.*)

In dissent, Circuit Judge Moore found that the majority's reliance on *Florida Power* was misplaced. According to Judge Moore's analysis, *Florida Power* "made it clear that there is a definite cleavage between supervisory work and 'rank-and-file' work." (Networks' Pet. App. C-5.) Applying *Florida Power*'s "adverse effects" test to the present cases, Moore determined that this test was fully satisfied because the "*in terrorem* action by the Guild would inevitably have an effect of inclining these employees [the supervisor-members] towards their Unions in matters supervisory and managerial when they should have been free of any coercive influences." (*Id.*) Finally, Judge Moore found that the Board's findings were amply supported by the record and that the Board's decision should therefore be enforced because "[t]he Court of Appeals should not usurp the function of the ALJ and Board unless there is a complete absence of evidence to support its findings." (*Id.* at C-6.)

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*"Networks' Pet. App. C-3" refers to page C-3 of appendix C to the Networks' petition for a writ of certiorari in No. 76-1121. Similar designations will be used throughout this brief.

SUMMARY OF ARGUMENT

I.

Section 8(b)(1)(B) of the Act prohibits union restraint or coercion of an employer "in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances." The section has consistently been interpreted by the Board and the courts to prohibit such restraint and coercion whether applied to an employer directly or whether applied indirectly through union discipline of supervisor-members who are vested with grievance adjusting or collective bargaining authority. Thus, the Board has found § 8(b)(1)(B) violations where supervisor-members who are vested with grievance adjusting or collective bargaining authority are disciplined by unions for performing their normal supervisory duties other than grievance adjusting or collective bargaining.

In *Florida Power & Light Co. v. I.B.E.W., Local 641*, 417 U.S. 790 (1974), the Court held that "unions did not violate § 8(b)(1)(B) of the Act when they disciplined their supervisor-members for performing *rank-and-file struck work*." 417 U.S. at 813 (emphasis supplied). In the instant cases, the lower court mistakenly read *Florida Power* as controlling. It is not. The Court in *Florida Power* did not set aside prior Board cases. Rather, the Court recognized that union discipline of supervisor-members which may adversely affect their performance as collective bargainers or grievance adjusters violated § 8(b)(1)(B). The Court determined, however, that union discipline of supervisor-members for performing "rank-and-file struck work" during a lawful economic strike could not "adversely affect" supervisor-members' future performance of their duties as grievance adjusters and collective bargainers. The Court's narrow holding in *Florida Power* left it to the Board in its expertise to determine in future cases

involving different factual circumstances, whether and to what degree union discipline of supervisor-members who do not perform rank-and-file struck work is likely adversely to affect their future performance as grievance adjusters and collective bargainers. See *Wisconsin River Valley District Council of Carpenters v. NLRB*, 532 F.2d 47 (C.A. 7 1976); *Chicago Typographical Union No. 16 v. NLRB*, No. 75-1320 (C.A.D.C. June 21, 1976), *enforcing* 216 N.L.R.B. No. 149 (1975), *petition for cert.* filed 45 U.S.L.W. 3385 (Nov. 16, 1976).

The Board determined in the instant cases that the Guild's well planned and calculated campaign of threats, substantial fines, expulsion and blacklisting of supervisor-members who performed solely their managerial and supervisory duties would be likely adversely to affect their future performance as collective bargainers and grievance adjusters on behalf of their employers. The conclusion that the Guild's *in terrorem* tactics would have the probable effect of precluding the supervisor-members from effectively and responsibly acting on behalf of their employers in their capacities as grievance adjusters and collective bargainers lest they again offend the Guild is correct and unassailable. It is amply supported by the record and under well established principles of judicial review ought not to have been disturbed by the court below.

The Board correctly found that the supervisor-members in these cases are employer representatives vested with the authority to adjust grievances or collectively bargain who performed no rank-and-file struck work during the strike. These findings, which were not disturbed by the court below, are supported by substantial evidence on the record as a whole and therefore are conclusive.

II.

The Court's narrow holding in *Florida Power* was based entirely on the distinction drawn between the performance of normal supervisory duties and the performance of rank-and-file struck work. The Guild contended below that there is no real distinction between normal supervisory duties and the performance of rank-and-file struck work and urged that *Florida Power*'s limited rank-and-file struck work exception to § 8(b)(1)(B) be expanded into a general crossing a picket line exception. A majority of the panel of the court of appeals agreed. *Florida Power* should not, however, be expanded to permit union discipline of supervisor-members who perform solely their normal supervisory duties. Rather, if the Court is to reconsider the distinction between the performance of rank-and-file struck work and the performance of normal supervisory duties, *Florida Power* should be overruled.

Florida Power has blurred the distinction between management and labor which Congress sought to establish, it has proved unwieldy in its application, and it has deprived employers, such as the Networks herein, of their only effective means of assuring supervisory loyalty.

Congress was extremely concerned with insuring that employers would be guaranteed the undivided loyalty of their supervisors when it amended the Act in 1947. The overall legislative history of the 1947 amendments and the language of the Act demonstrate Congress' intent that there be no middle ground between supervisors and employees and that the former be treated solely as a part of management. Even *Florida Power*'s rank-and-file struck work exception to § 8(b)(1)(B) exacerbates the problem by depriving employers of their supervisors' loyalty at the very time when

the need for such loyalty is paramount. Moreover, a supervisor-member performing rank-and-file struck work during a strike to enhance his employees' bargaining position is as much a "part and parcel of the process of collective bargaining," *NLRB v. Insurance Agents International Union*, 361 U.S. 477, 495 (1960), as are the strikers manning picket lines.

Florida Power's focus on the type of work performed by supervisor-members has also proved to be unwieldy and difficult to apply, generating uncertainty as to what duties employers may require their supervisors to perform. Thus, in each case, the Board has had to determine precisely what duties were performed by supervisor-members behind picket lines, whether those duties differed significantly from those performed prior to the strike, and whether they constitute rank-and-file struck work.

Finally, *Florida Power*'s suggestion that employers have the option of securing supervisory loyalty either by requiring supervisors to resign from unions or by not hiring those that are members in the first place has proved to be illusory, as evidenced by the present cases. The Guild refused to accept the supervisor-members' resignations. Moreover, in the entertainment industry there is a long established tradition of creative managers and supervisors retaining some form of membership in many guilds and unions because they may return to performing writing or other creative work at some time in the future; employers are therefore effectively precluded from refusing to select some Guild members as their representatives for adjusting grievances or collective bargaining or there would be very few qualified persons whom they could so select. Accordingly, the only effective protection of the Networks' right to choose whomever they wish as grievance adjusters and collective bargainers is § 8(b)(1)(B).

ARGUMENT.

I.

The Guild's Blacklisting Threats and Discipline of the Networks' Supervisor-Members Violated Section 8(b)(1)(B) of the Act by Restraining and Coercing the Networks in the Selection of Their Representatives for the Purposes of Collective Bargaining and the Adjustment of Grievances.

A. The Networks Were Restrained and Coerced in the Selection of Their Supervisor-Members.

The early § 8(b)(1)(B) cases brought before the Board involved union restraint and coercion applied directly to an employer to pressure it to dismiss labor relations personnel hostile to unions or to appoint personnel favorable to organized labor.* In *San Francisco-Oakland Mailers Union No. 18 (Northwest Publications, Inc.)*, 172 N.L.R.B. 2173 (1968), the Board found that union discipline of three supervisor-members for their interpretation and application of a collective bargaining agreement violated § 8(b)(1)(B) by indirectly restraining and coercing the employer in its choice of its representatives because the employer "would have to replace its foremen or face *de facto* nonrepresentation by them." *Id.* at 2173. The fact that the union chose to exert pressure on the employer by indirect rather than direct means did not lessen the unlawful restraint and coercion.

Subsequent to *Oakland Mailers*, the Board continued to find § 8(b)(1)(B) violations in cases where unions indirectly coerced employers in the selection of

See, e.g., Los Angeles Cloak Joint Board, ILGWU (Helen Rose Co.), 127 N.L.R.B. 1543 (1960); *Orange Belt District Council of Painters No. 48*, 152 N.L.R.B. 1136 (1965); *Warehousemen, Drivers and Helpers Local 986*, 145 N.L.R.B. 1511 (1964).

their grievance adjusters and collective bargainers by disciplining supervisor-members who are vested with grievance adjusting or collective bargaining authority for performing their other supervisory duties. These decisions were uniformly upheld by the various courts of appeals.*

However, in 1973 a bare majority of the Court of Appeals for the District of Columbia, sitting *en banc*, determined on rehearing in the *Florida Power* cases** that the Board had unduly expanded the scope of § 8(b)(1)(B) in holding that union discipline

Meat Cutters Local 81 (Safeway Stores), 185 N.L.R.B. 884 (1970), *enforced*, 458 F.2d 794 (C.A.D.C. 1972) (§ 8(b)(1)(B) violated by discipline imposed on supervisor-member for his implementation of employer's new meat procurement policy); *Dallas Mailers Union Local 143 (Dow Jones Co. Inc.)*, 181 N.L.R.B. 286 (1970), *enforced*, 445 F.2d 730 (C.A.D.C. 1971) (unlawful union discipline when imposed for manner in which supervisor-member directed employee to perform duties); *Sheet Metal Workers' International Association, Local Union 49 (General Metal Products, Inc.)*, 178 N.L.R.B. 139 (1969), *enforced* 430 F.2d 1348 (C.A.10 1970) (supervisor-member unlawfully disciplined for performing work allegedly within union's jurisdiction); *New Mexico District Council of Carpenters & Joiners of America (A.S. Horner, Inc.)*, 176 N.L.R.B. 797 and 177 N.L.R.B. 500 (1969), *both enforced*, 454 F.2d 1116 (C.A.10 1972) (§ 8(b)(1)(B) violation found where union disciplined supervisor-members for working without union work permit and for signing pro-management letter); *Toledo Locals Nos. 15-P & 272, Lithographers & Photoengravers International (Toledo Blade Co., Inc.)*, 175 N.L.R.B. 1072 (1969), *enforced*, 437 F.2d 55 (C.A.6 1971) (§ 8(b)(1)(B) violated by union discipline of supervisor-members for working beyond normal work hours with too small a work crew, allegedly in violation of union work rules).

**The original case before the court of appeals, *I.B.E.W. v. N.L.R.B. (Illinois Bell)*, 487 F.2d 1113 (C.A.D.C. 1972), involved the same issue presented in *Florida Power*. The panel which decided that case, however, held that union discipline of supervisor-members for performing rank and file struck work does violate § 8(b)(1)(B). Subsequently, a petition for rehearing was granted in *Illinois Bell*, 487 F.2d at 1143, the case was consolidated with *Florida Power*, and the court of appeals *en banc* reversed the panel in a 5-4 decision.

of supervisor-members for performing rank-and-file struck work during the course of an economic strike constituted a § 8(b)(1)(B) violation. *I.B.E.W., Local 641 v. NLRB*, 487 F.2d 1143 (C.A.D.C. 1973). The court did not dispute the Board's holdings in prior cases that union discipline of a supervisor-member vested by his employer with grievance adjusting or collective bargaining authority for performing supervisory duties other than grievance adjusting or collective bargaining restrained and coerced his employer in violation of § 8(b)(1)(B). Rather, the court stated:

> "When a supervisor acts as such he is a representative of management, and as such should be immune from union discipline. The unions participating in the present cases conceded as much at oral argument when they agreed that when a supervisor crosses a picket line to perform *supervisory* work he remains immune from discipline. But when a supervisor forsakes his supervisory role to do rank-and-file work ordinarily the domain of nonsupervisory employees, he is no longer acting as a management representative and no longer merits any immunity from discipline."* *Id.* at 1157 (emphasis in original).

The court disagreed, however, with the Board's determination that discipline of supervisor-members vested with grievance adjusting or collective bargaining authority for performing solely rank-and-file struck work would have any coercive effect upon an employer.

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*The court specifically did not overrule its prior decision in *Meat Cutters Union Local 81 v. NLRB*, 458 F.2d 794 (C.A.D.C. 1972), which held that § 8(b)(1)(B) was violated by union discipline of a supervisor-member for performance of supervisory functions which did not involve collective bargaining or the adjustment of grievances. 487 F.2d at 1157-58.

This was the decision facing the Court in *Florida Power*. The Court clearly recognized the specific and narrow issue presented to it* and reached an equally narrow holding:

> "[W]e hold that the respondent unions did not violate § 8(b)(1)(B) of the Act when they disciplined their supervisor-members for *performing rank-and-file struck work*." *Id.* at 813 (emphasis supplied.)

After reviewing the legislative history of § 8(b)(1)(B) and concluding that Congress intended to restrain union conduct which is likely to influence an employer's selection of its representatives vested with the authority to adjust grievances or collectively bargain, the Court formulated the following test:

> "[A] union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." *Id.* at 804-805.

Clearly, the Court in *Florida Power* did not reject the Board's application of § 8(b)(1)(B) to prohibit union discipline of supervisor-members which may adversely affect their future performance as collective bargainers or grievance adjusters on behalf of their employer. Rather, the Court disagreed with the Board's opinion that union discipline of a supervisor-member vested with grievance adjusting and collective

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*"The question to be decided is whether the unions committed unfair labor practices under § 8(b)(1)(B) when they disciplined their supervisor-members for crossing the picket lines and performing rank-and-file struck work during lawful economic strikes against the companies." 417 U.S. at 792.

bargaining authority for performing solely rank-and-file struck work can have such an adverse effect.

Florida Power, therefore, is not controlling where, as in the instant cases, supervisor-members who do not perform rank-and-file struck work are nevertheless subjected to union discipline. The Court has left the determination whether such union discipline restrains and coerces an employer by adversely affecting the supervisor-members' future performance of collective bargaining and grievance adjusting functions to the Board. It thus remains the function of the Board, "as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge," *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951), to determine based upon the facts and circumstances of each case whether the union discipline imposed on supervisor-members "may adversely affect" their future performance in adjusting grievances or collectively bargaining. As discussed below, the Board's determination of this issue in the instant cases is in accord with Board precedent following *Florida Power*, and because it has " 'warrant in the record' and a reasonable basis in law," *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944), it ought not to have been disturbed by the court below. *Universal Camera Corp. v. NLRB, supra.*

In the instant cases, the Board made such determination by relying upon its post-*Florida Power* decisions in support of its finding of a § 8(b)(1)(B) violation. *Chicago Typographical Union No. 16 (Hammond Publishers, Inc.)*, 216 N.L.R.B. 903 (1975)*, *New York Typographical Union No. 6 (Triangle Publications,*

*Enforced, *Chicago Typographical Union, No. 16 v. NLRB* No 75-1320 (C.A.D.C. June 21, 1976), *petition for cert. filed*, 45 U.S.L.W. 3385 (Nov. 16, 1976).

Inc.), 216 N.L.R.B. 896 (1975). These decisions set forth more fully the Board's rationale.* In *Hammond Publishers, Inc., supra*, the Board focused upon the "adverse effect" test of *Florida Power* and concluded:

> "[t]he . . . question of 'when that discipline may adversely affect the supervisor's conduct . . .' clearly depends on an analysis of the activity engaged in by the supervisor during the period for which the discipline is imposed, rather than on any evaluation of the union's motivation." 216 N.L.R.B. at 904.

In the Board's view, union discipline of a supervisor-member for crossing a picket line to perform only supervisory duties violates § 8(b)(1)(B) because "it is reasonably likely that an adverse effect will carry over to the supervisor's performance of his 8(b)(1)(B) duties. . . ."** *Id.*

The Board amplified its view of the scope of § 8(b)(1)(B) in light of *Florida Power* in *Triangle Publications, Inc., supra:*

> "We believe that the adverse future effect which the Supreme Court referred to as violative in *Florida Power* is as likely to occur, regardless of a union's professed reasons or intent, if a

*As this Court noted in *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 443 n.6 (1965), it is perfectly proper for the Board to "articulate the basis of its order by reference to other decisions."

**The Board drew support for this conclusion from the fact that the majority decision in *Florida Power* noted that the supervisors therein who crossed the picket line to perform only their supervisory functions were not disciplined by the union. In addition, the Board noted Mr. Justice White's comment in his dissenting opinion in *Florida Power* that "I do not read the Court to say that § 8(b)(1)(B) would allow a union to discipline supervisor-members for performing supervisory or management functions, as opposed to customary rank-and-file work, during a labor dispute." *Hammond Publishers, Inc.*, 216 N.L.R.B. 903, 904 n.9.

supervisor-member is disciplined after having performed only his normal supervisory duties or if he is disciplined after having engaged in contract interpretation. In the latter case, it is the supervisor's future manner of contract interpretation which is likely to be influenced and in the former case it is the supervisor's actual future performance of supervisory duties, including grievance adjustment or collective bargaining, which is likely to be influenced. In either case, the employer has been restrained in the selection of his 8(b)(1)(B) representative." 216 N.L.R.B. at 897.

The Board's determination in the instant cases that the reasonably foreseeable effect of the Guild's campaign of threats and discipline against the supervisor-members would be to make them reluctant to take a position adverse to the Guild in the future performance of their supervisory duties, including acting in their capacities as collective bargainers and grievance adjusters, is sound.

It is precisely this type of determination that the Board, "informed with experience to deal with a specialized field of knowledge," is vested by the Act with making. The *in terrorem* action employed by the Guild through its sweeping "Rules For Conduct of Members During a Strike" enforced by its threats and actions of fines, expulsion and blacklisting were calculated to make any supervisor-member who wished to continue working in the entertainment industry in a managerial or supervisory capacity very wary of offending the Guild in any way whatsoever. Having once felt the lash of Guild discipline as a result of merely performing his normal supervisory duties during the strike, which conduct the Guild apparently believed was adverse to it, a supervisor-member would tend to tread very cautiously in his future conduct, for

fear that he again invoke the imposition of sanctions which might preclude him from carrying on with his occupation.* After suffering a $50,000 fine and blacklisting in the industry for crossing the Guild's picket line a supervisor-member will, on each future occasion in which he finds himself in a potentially adversary position to the Guild, when adjusting grievances or engaging in collective bargaining, be dissuaded from freely exercising his unfettered discretion on behalf of his employer by the specter of what might occur if he displeases the Guild. The foreseeable result of the Guild's actions is a representative vested with grievance adjusting or collective bargaining authority who has a diminished capacity to function effectively in that role on behalf of his employer. Clearly this deprives the employer of the management representative § 8(b)(1)(B) contemplates.

The panel majority below erroneously held as a matter of law that the Board incorrectly applied § 8(b)(1)(B) as interpreted in *Florida Power* to the instant cases. Under its view, the type of work actually performed by the supervisor-members is irrelevant, eith-

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*Implementation of the Guild's Strike Rule 30 by blacklisting supervisor-members was intended to and would prevent these individuals from continuing to work as producers, directors, story editors, and in other management positions where working with writers is essential. (Tr. pp. 690-92, 844-47.) As the Administrative Law Judge found:

> "The hyphenate-members were particularly vulnerable to pressure under rule 30 because in their primary work as producers, directors, story editors and executives, they would be unable to effectively function in the future if writer-members of Respondent refused to work for or with them. In telephone conversations with certain of the hyphenates, agents of Respondent emphasized this consequence should the hyphenate cross the picket line to work. The wife of one hyphenate-member was assured that Respondent would end her husband's rather distinguished career by not permitting writers to work with him if he crossed the picket line." (Networks' Pet. App. A at 23-24.)

er because the Board is not authorized by § 8(b)(1)(B) to make the determination that the Guild's conduct would be likely to adversely affect the supervisor-members' performance in their capacities of grievance adjusters and collective bargainers on behalf of their employers, or because the panel disagrees with the Board's determination of the issue. The Seventh and District of Columbia Circuits have unmistakably rejected both of these views and would have enforced the Board's order herein. As stated by Judge Sprecher of the Court of Appeals for the Seventh Circuit in *Wisconsin River Valley District Council of Carpenters v. NLRB*, 532 F.2d 47, 53 (C.A. 7 1976):

> "[F]lorida Power and its antecedents teach that the focus of a Section 8(b)(1)(B) inquiry rests on the nature of the supervisors' duties when discipline is imposed. Where supervisors cross picket lines to perform regular supervisory duties, union discipline violates Section 8(b)(1)(B) since it tends to deprive the employer of its supervisors' services—including their § 8(b)(1)(B) services—and because the supervisors would reasonably anticipate that union discipline would also be imposed if future performance of their § 8(b)(1)(B) functions did not meet with union approval."

See also Chicago Typographical Union No. 16 v. NLRB, No. 75-1320 (C.A.D.C. June 21, 1976), *enforcing* 216 N.L.R.B. No. 149 (1975), *petition for cert. filed*, 45 U.S.L.W. 3385 (Nov. 16, 1976).

Unlike the majority opinion herein, these decisions and Judge Moore's dissenting opinion properly read *Florida Power* as leaving for the Board to determine in each case whether union discipline of supervisor-members who do not perform rank-and-file struck work has the adverse future effect referred to in Florida Power.

Finally, the principle established by the court below allowing a union to discipline supervisor-members who are vested with grievance adjusting or collective bargaining authority and who perform solely their supervisory duties goes far beyond this Court's limited holding in *Florida Power*. Unless reversed it will have established a new and heretofore unexpected economic weapon which destroys entirely Congress' concept that the clear and fundamental division between management and labor be maintained, a concept which has become an integral part of the statutory framework regulating labor-management relations. The decision below provides the vehicle, and it encourages unions to force management and supervisory individuals who may retain some form of union membership to cease the performance of their management and supervisory duties. Such a dramatic change in the traditional economic weapons available to unions is not one that is readily suggested by *Florida Power** nor compatible with § 8(b)(1)(B).

B. The Supervisor-Members Herein Are Employer Representatives Vested With Grievance Adjusting or Collective Bargaining Authority Who Did Not Perform Rank-and-File Struck Work During the Guild's Strike.

The Guild has indicated, in its Opposition to the Petitions for Writs of Certiorari in these cases, that it will attempt to resurrect the issues whether the supervisor-members are employer representatives within the meaning of § 8(b)(1)(B) and whether they performed rank-and-file struck work during the strike,

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*The unions involved in *Florida Power* fined only those supervisor-members who performed rank-and-file struck work, 417 U.S. at 793-96, and conceded that supervisors who cross picket lines to perform supervisory duties are immune from discipline. *I.B.E.W. Local 134 v. NLRB*, 487 F.2d 1143, 1157 (D.C. Cir. 1973) (opinion on rehearing *en banc*).

despite the fact that the court below left undisturbed the findings of the Administrative Law Judge and the Board, who determined these very issues adversely to the Guild. (Guild's Brief in Opposition, p. 3.) As the following discussion demonstrates, the Board's findings that the supervisor-members are employer representatives vested with grievance adjusting or collective bargaining authority and that they did not perform rank-and-file struck work during the strike are supported by "substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Its findings herein are thus "entitled to the greatest deference in recognition of its special competence in dealing with labor problems" *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 316 (1965).

With respect to the status of the supervisor-members, the Administrative Law Judge, after carefully reviewing all the evidence, found that "the normal performance of the hyphenates' primary functions involves the adjustment of employee grievances, and, in the case of producers on distant location, to engage in collective bargaining with labor organizations." (Networks' Pet. App. A-41.) Therefore, he concluded that the supervisor-members herein "are supervisors within the meaning of Section 2(11) of the Act selected by their employers to adjust grievances, and, in the case of the producer function, to negotiate agreements with labor organizations within the meaning of Section 8(b)(1)(B) of the Act." (*Id.* at A-45.) These findings are amply supported by the record. (A. pp. 31-32, 62-63, 73-74, 107-08, 124-30, 140-41, 153-54.)

Despite the record evidence, the Guild contended below that the supervisor-members herein do not constitute § 8(b)(1)(B) representatives because there is no

evidence that they adjust writer's grievances.* However, there is no statutory or decisional support for the proposition that the employer representative contemplated by § 8(b)(1)(B) must adjust the grievances of members of the union which disciplines him. To the contrary, the Board has properly applied § 8(b)(1)(B) without regard to whether the management representative involved has any dealings with employees represented by the disciplining union. *Masters, Mates and Pilots*, 197 N.L.R.B. 400 (1972), *enforced*, 486 F.2d 1271, 1274 (C.A.D.C. 1973) (rejecting contention that § 8(b)(1)(B) "is concerned solely with attempts by a labor organization to change the person utilized by the employer to adjust the grievances of members of that same organization"). *See also International Organization of Masters, Mates and Pilots v. NLRB*, 539 F.2d 554, 559-560 (C.A.5 1976). The record evidence herein clearly demonstrates and the Guild does not dispute that the supervisor-members herein adjust grievances of many types of employees not represented by the Guild. (A. pp. 31-32, 62-63, 93-94, 107-08, 124-26, 153-54, 155-56.)

Furthermore, the finding that the supervisor-members herein do have the authority to adjust the grievances

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*The Guild has conceded that the supervisor-members (other than story editors) may adjust the grievances of employees other than writers. (A. p. 590.) The Guild has contended that story editors do not constitute § 8(b)(1)(B) representatives because they do not have the final authority to adjust grievances. However, the Board and the courts have consistently held that supervisors who participate in the initial discussions of employee complaints are representatives for the purpose of the adjustment of grievances within the meaning of § 8(b)(1)(B). *Meat Cutters Union Local 81 (Safeway Stores)*, 185 N.L.R.B. 884, 888 (1970), *enforced*, 458 F.2d 794 (C.A.D.C. 1972); *Sheet Metal Workers' International Association, Local Union 49 (General Metal Products, Inc.)*, 178 N.L.R.B. 139, 142 (1969), *enforced*, 430 F.2d 1348 (C.A.10 1970). The record clearly reflects that story editors constitute firstline grievance adjusters for writers. (A. pp. 54, 79, 109, 132.)

of writers is supported by the record. For example, at least two witnesses testified that producers and story editors make initial determinations of disputes regarding screen credits for writers. (A. pp. 54-55, 79.) Story editors also participate in the initial disposition of screen credit disputes, and they have the authority to adjust other grievances involving disagreements between writers and members of the production staff. (A. pp. 79, 132.) Finally, one witness described an incident in which a producer made the initial determination on behalf of management in a dispute involving whether or not a commitment had been made to hire a writer. (A. pp. 40-41.)

The Guild's contention below that the supervisor-members are not employer representatives within the meaning of § 8(b)(1)(B) because there is no evidence that they actually engaged in grievance adjustment or collective bargaining during the strike is equally without merit. As the Board and courts have uniformly held, it is the *authority* to adjust grievances, rather than the exercise of that authority during any particular period of time, which determines whether or not a supervisor is an employer representative within the meaning of § 8(b)(1)(B). *See, e.g., NLRB v. Rochester Musicians Association Local 66*, 514 F.2d 988, 991-993 (C.A.2 1975) (remanded for determination of whether supervisor had *authority* to adjust grievances); *Meat Cutters Union Local 81 v. NLRB, supra*, 458 F.2d at 798 (C.A.D.C. 1972) (since supervisor "concededly possessed the *authority* to adjust the grievances of the employees working under his direction," (emphasis supplied), he was a § 8(b)(1)(B) representative); *Meat and Provision Drivers Union Local 626, I.B.T. (Food Employers Council)*, 224 N.L.R.B. No. 40, 92 L.R.R.M. 1295, 1296 (1976), application for enforcement pending No. 76-2616 (C.A.9) (Board's

finding that supervisor-member "was the employer representative designated with the authority to adjust grievances").

Moreover, this argument of the Guild proves too much. Under the Guild's theory, there could be no coercion or restraint on employers in the selection of their grievance adjusters during a truly effective strike, because in such circumstances no employees would cross the picket line and be available to have their grievances adjusted.

With respect to the performance of rank-and-file struck work by the supervisor-members during the strike, the Administrative Law Judge found that "such writing as the hyphenates did during the strike was limited to that commonly accepted in the industry as part of the managerial and supervisory function and thus was not rank-and-file work." (Networks' Petition App. A at 42-43.) Moreover, the Guild "points to no instance of any hyphenate doing any 'rank-and-file' work during the strike." (*Id.* at A-41.) Accordingly, "[o]n the basis of the . . . record as a whole it is found . . . that those hyphenates involved in this matter who worked during the strike performed managerial and supervisory functions including the adjustment of grievances on [sic] collective bargaining as required, and did not perform rank-and-file work." (*Id.* at A-45-46.)

In the face of these conclusions, the Guild nevertheless contended below that the so-called (a) through (h) functions performed by supervisor-members during the strike constituted rank-and-file struck work so as to bring these cases within the parameters of *Florida Power*. This assertion, however, finds no support in the record.

The (a) through (h) functions were expressly excluded from the contractual definition of bargaining unit work. Article 14, paragraph A of the WGA-

Network Film Agreement specifically provided that the terms of employment of members engaged in capacities "other than as a writer . . . shall not be subject to this Basic Agreement." (A. p. 338.) Article I, paragraphs B.1.a and C.1.a of the Agreement provided that the performance of (a) through (h) duties "by Producers, Directors, Story Supervisors . . . [or] other employees . . . *shall not be subject to this Basic Agreement and such services shall not constitute such a person a writer hereunder.*" (A. pp. 317-18, 322-23; emphasis supplied.) Accordingly, it is beyond dispute that neither the Guild nor the employers deemed (a) through (h) functions to be rank-and-file work when performed by supervisors.

In addition, it is clear that the Guild itself did not regard the (a) through (h) functions as rank-and-file struck work when it disciplined the supervisor-members. Although several of the Guild's strike rules specifically prohibited the performance of bargaining unit work during the strike (*see, e.g.*, Rules 2-7), none of the Networks' supervisor-members were charged with violation of those rules. Instead, by the Guild's own admission, its prosecutor and disciplinary panels proceeded without regard to the nature of the services performed, and regarded crossing the picket line for any purpose as grounds for discipline. (A. pp. 160-61; Networks' Pet. App. A-28 n. 15.)

Moreover, whether or not the (a) through (h) functions may also be performed by bargaining unit employees, performance of these functions by supervisor-members during the strike manifestly did not involve the performance of rank-and-file struck work. The supervisor-members were not performing any functions that, but for the strike, would have been performed by the Guild's writer-members. To the contrary, as the Administrative Law Judge found,

> "The evidence is that the hyphenates who worked during the strike performed the normal functions of the primary positions for which they were employed prior to the strike, e.g., director, producer, story editor, etc. . . ." (Networks' Pet. App. A-28.)

This evidence is supported in the record. (A. pp. 137-38, 157, 178.) Thus not only did the Networks not request the supervisor-members to perform any rank-and-file struck work during the strike (A. pp. 531-32), the Networks followed a policy during the strike of not requiring supervisor-members to perform rank-and-file struck work. (A. pp. 175-76, 177-78; Networks' Pet. App. A-25.) Further, there is no evidence in the record that rank-and-file struck work was in fact performed by the supervisor-members. Accordingly, this contention of the Guild must likewise be dismissed.

II

The Guild's Contention, Accepted by the Court Below, That Florida Power Should Be Expanded to Permit Union Discipline of Supervisor-Members for Performing Solely Their Supervisory Duties Because There Is No Real Distinction Between the Performance of Normal Supervisory Duties and the Performance of Rank-and-File Struck Work Is Without Merit and Would Require This Court to Reconsider Such Distinction. If the Court Reconsiders Such Distinction, Florida Power Should Not Be Expanded but Should Be Overruled.

As set forth at pp. 25-26, *supra*, the Court's narrow holding in *Florida Power* was based entirely on the distinction drawn between the performance of normal supervisory duties and the performance of rank-and-file struck work. In its brief to the court below, the

Guild argued that this distinction is meaningless because if the absence of the supervisor-members is what restrains and coerces the employer in its selection of its representatives, this occurs no matter what work the supervisor-members perform. (Guild's Opening Brief to the Court of Appeals for the Second Circuit, at 14-15.) Thus, in the Guild's view, *Florida Power*'s rank-and-file struck work exception to § 8(b)(1)(B) should be expanded into a much broader crossing the-picket-line exception. The court below and Member Fanning have apparently agreed with this view. As will be shown below, however, *Florida Power*'s rank-and-file struck work exception to § 8(b)(1)(B) should not be expanded. Rather, if the Court is inclined to reconsider the merits of the distinction, *Florida Power* should be overruled.

The Court has often recognized the importance to the collective bargaining process contemplated by the Act and federal labor policy of the clear separation between management and labor which Congress attempted to achieve by the statutory assurance to employers of the undivided loyalty of their supervisors and managers and by the prohibition against treating supervisors or managers as employees. *Florida Power, supra,* 417 U.S. at 807-811. *See NLRB v. Bell Aerospace Co.,* 416 U.S. 267 (1974); *Beasley v. Food Fair of North Carolina, Inc.,* 416 U.S. 653, 661-662 (1974). Thus, Section 2(3) of the Act, 29 U.S.C. § 152(3), excludes supervisors and managers from the Act's definition of employees (*See NLRB v. Bell Aerospace, supra*), and Section 14(a) of the Act, 29 U.S.C. § 164(a), provides in relevant part that "[n]o employer . . . shall be compelled to deem . . . supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

The concern which prompted enactment of §§ 2(3) and 14(a) requires an interpretation of § 8(b)(1)(B) which is in harmony with §§ 2(3) and 14(a) and which effectuates Congress' purpose in enacting all three provisions. Each of these provisions was the result of the 1947 Taft-Hartley Amendments to the Act. 61 Stat. 137, 61 Stat. 140, 61 Stat. 151, Act of June 23, 1947. Congress was concerned that the previous interpretations of the Act by the Board and courts blurred the line between management and labor, thereby adversely affecting the free operation of the collective bargaining process envisaged by the Act.

As stated by Senator Ball:

> "The committee took the position that foremen are an essential and integral part of management, and that to compel management to bargain with itself, so to speak, by dividing the loyalties of foremen between the union and the employer, simply did not make sense, and inevitably would prove harmful to the free enterprise system." 93 Cong. Rec. 5014 (1947); II Legislative History of the Labor-Management Relations Act (GPO, 1948) (hereafter "Leg. Hist.") 1496.

Statutory provisions to establish a clear division between management and labor, between supervisors and rank-and-file employees, and between management representatives and labor representatives were extensively considered and debated. *See, e.g.* 93 Cong. Rec. 4136 (1947) (remarks of Senator Ellender), II Leg. Hist. 1064 (supervisors are "not to be considered as employees having bargaining rights under the Wagner Act"); S. Rep. No. 105, 80th Cong., 1st Sess. 12-17 (1947), I Leg. Hist. 303-308 ("unionizing supervisors under the Labor Act is inconsistent with the

purpose of the act"); 93 Cong. Rec. 3443 (1947) (remarks of Representative Gwinn), I Leg. Hist. 647 (foremen "are supposed to represent management" and "to be loyal to the management's point of view"). Congress in fact rejected a proposed compromise which "would have limited the protection of foremen to joining or organizing unions whose membership was confined to supervisory personnel and not affiliated with either of the major labor federations." S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947), I Leg. Hist. 410. *See also*, 93 Cong. Rec. 4899, 4903-04 (1947) (amendment proposed by Senator Murray and remarks of Senator Murray), II Leg. Hist. 1443, 1452. In Congress' view, the division between supervisors and employees required clear definition and was not subject to halfway measures. As stated by Senator Taft:

> "We tried various in-between steps, but the general conclusion was that they [supervisors] must either be a part of management or a part of the employees." 93 Cong. Rec. 3836 (1947), II Leg. Hist. 1009.

Accordingly, in enacting § 14(a), Congress undertook to guarantee that supervisors would not be subject to conflicting pressures on their loyalty:

> "[T]his section of the bill [§ 14(a)] is an example of the old adage, 'One cannot serve two masters.' It would be an utterly impossible position in which to place a man—he would be paid by his employer but he [would be] expected to go along with the union of which he was a member." 93 Cong. Rec. A 1910 (remarks of Representative Meade), I Leg. Hist. 868-69.

Similarly, the Senate Report noted:

> "It is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent tendency to subordinate their interests wherever they conflict with those of the rank-and-file." S. Rep. No. 105, 80th Cong., 1st Sess. 5 (1947), I Leg. Hist. 411.

Clearly Congress was extremely concerned with securing supervisory and management loyalty to employers by means of these amendments, and all of the amendments, including § 8(b)(1)(B), should be interpreted in light of this concern.

The overall legislative history of the Taft-Hartley Amendments places in proper context the mechanisms Congress enacted to resolve the conflict-of-loyalties problem with which it was so concerned. Accordingly, supervisors are defined (§ 2(11)), they are excluded from coverage under the Act (§ 2(3)), employers are not compelled to treat them as employees (§ 14(a)) and, to the extent that they are representatives of their employer for the purposes of grievance adjusting or collective bargaining, labor organizations are prohibited from restraining or coercing employers in their selection (§ 8(b)(1)(B)). The legislative scheme presents a logical, coherent solution to the conflict-of-loyalties problem and effectuates the Act's overall purpose of "encouraging the practice and procedure of collective bargaining." § 1 of the Act, 29 U.S.C. § 151.

However, in carving out the narrow rank-and-file struck work exception to § 8(b)(1)(B), a bare majority of the Court stated that Congress "did not intend to make [§ 8(b)(1)(B)] any part of the solution to the generalized problem of supervisor-member conflict of loyalties." 417 U.S. at 813. The four dissenting Justices disagreed. In their opinion, § 8(b)(1)(B) is a vital part of the multi-faceted solution to the problem that so concerned Congress and the sec-

tion is violated when a union disciplines a supervisor who works for his employer during a strike irrespective of the nature of the work performed. Mr. Justice White stated:

> "Nothing in the language or legislative history of the statute contradicts the conclusion that '[w]hen a union disciplines a supervisor for crossing a picket line to perform rank-and-file work at the request of his employer, that discipline *equally* interferes with the employer's control over his representative and *equally* deprives him of the undivided loyalty of that supervisor as in the case where the discipline was imposed because of the way the supervisor interpreted the collective bargaining agreement or performed his "normal" supervisory duties.'" 417 U.S. at 815 (quoting from dissenting opinion below, 487 F.2d at 1176; footnote omitted.)

It is submitted that the dissent's interpretation of § 8(b)(1)(B) is in accord with the legislative history and the language of the statute. Certainly this legislative history and statutory language strongly militate against any further expansion of *Florida Power*. Moreover, while reversal of the court below in the instant cases is mandated under the Board's interpretation and application of *Florida Power* (*see* pp. 22-31, *supra*), *Florida Power* should nevertheless be reconsidered and overruled.

Florida Power's focus on the type of work performed by supervisor-members during a strike misses the mark. Rather than being neutral with respect to the conflict-of-loyalties problem with which Congress was so concerned, the decision exacerbates the problem. Moreover, the distinction between rank-and-file struck work and supervisory work implicit in *Florida Power* is one which

subsequent experience has shown to be extremely difficult to apply. Further, failure to construe § 8(b)(1)(B) as part of Congress' overall solution to the conflict-of-loyalties problem has deprived employers of their only effective means of ensuring supervisory loyalty in the midst of the collective bargaining process, the very situation in which the need for such loyalty is paramount.

The notion that union discipline of supervisor-members who perform rank-and-file struck work does not vitiate their loyalty to their employer does not take into account the realities of the collective bargaining process. Supervisors who perform struck work in order to enhance their employer's position during an economic strike are vitally involved in the collective bargaining process. They are as integral a part of the collective bargaining process whether, upon orders from their employer, they perform struck work, hire striker replacements, or work with and supervise employees who cross picket lines to work during the strike as are the employees who are striking and manning picket lines. As the Court has long recognized, the "use of economic pressure by the parties to a labor dispute . . . is part and parcel of the process of collective bargaining." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 495 (1960). Thus by influencing the outcome of a strike through improving their employer's bargaining position, supervisor-members must certainly be considered representatives of their employer "for the purposes of collective bargaining . . . ." § 8(b)(1)(B), 29 U.S.C. § 158(B)(1)(b). As stated by Justice White, dissenting in *Florida Power:*

> "'As management representatives, supervisory personnel may be requested by management to enhance the bargaining position of their employer during a dispute between it and the particular

union involved.' 159 U.S. App. D.C. 272, 304, 487 F.2d 1143, 1175 (1973) (en banc) (dissenting opinion) (footnote omitted). Moreover, these union sanctions would unavoidably decrease a supervisor's loyalty to his employer and thereby materially interfere with the performance of those responsibilities which the employer quite properly demands of him." 417 U.S. at 814 (dissenting opinion).

As discussed *supra*, Congress certainly did not contemplate that § 8(b)(1)(B) would be interpreted in a manner which undercuts the fundamental distinction between management and labor and thereby makes more severe the conflict-of-loyalties problems. Yet that is precisely what *Florida Power*'s construction of § 8(b)(1)(B) does. The union discipline found permissible in that case converted the supervisor-members therein into ordinary employees for purposes of union fines. In so doing, that discipline deprived the employer of the loyalty of its chosen § 8(b)(1)(B) representative during the strike, the very time when such loyalty may be most essential.

The focus on the nature of the work supervisor-members may perform free of union discipline has also proved unwieldy in its application, thereby generating unwarranted uncertainties for employers with respect to the functions that they may expect of supervisor-members while the employers are preparing for or are engaged in collective bargaining negotiations. The numerous § 8(b)(1)(B) cases which have come before the Board since *Florida Power* involving discipline of supervisor-members who cross picket lines have required lengthy fact finding processes on the nature of the work performed behind the picket lines.* The Board

**New York Typographical Union No. 6 (Triangle Publications, Inc.)*, 216 N.L.R.B. 896 (1975); *Chicago Typographical Union No. 16 (Hammond Publishers, Inc.)*, 216 N.L.R.B. 903 (1975) *enforced, Chicago Typographical Union No. 16 v. NLRB*, No. 75-1320 (C.A.D.C. June 21, 1976); *Bakery and Confectionery Workers Locals 24 & 119 (Food Employers Council, Inc.)*, 216 N.L.R.B. 917 (1975); *United Brotherhood of Carpenters, Local Union No. 14 (Kaplan Properties)*, 217 NLRB 202 (1975); *Local Union No. 1959, United Brotherhood of Carpenters, (Aurora Modular Industries)*, 217 N.L.R.B. 508 (1975); *Detroit Newspaper Printing Pressmen's Union, Local Union No. 13 (Observer Newspapers, Inc.)*, 217 N.L.R.B. 576 (1975); *Wisconsin River Valley District Council (Skippy Enterprises, Inc.)*, 218 N.L.R.B. 1063 (1975), *enforced*, 532 F.2d 47 (C.A.7 1976); *Warehouse Union Local 6 (Associated Food Stores, Inc.)*, 220 N.L.R.B. 809 (1975); *Glaziers and Glassworkers Local No. 1621 (Glass Management Assn.)*, 221 N.L.R.B. 509 (1975); *Newspaper Guild, Local 187 (Times Publishing)*, 222 N.L.R.B. 760 (1976); *Meat and Provision Drivers Union Local 626, I.B.T. (Food Employers Council)*, 224 N.L.R.B. No. 40 (1976), application for enforcement pending, No. 76-2616 (C.A. 9).

has thus had to wrestle with the problem of what constitutes "minimal" rank-and-file struck work in order to determine whether *Florida Power*'s rank-and-file struck work exception is controlling. *Hammond Publishers, Inc., supra*, 216 N.L.R.B. at 905-908; *Food Employers Council, Inc., supra*, 224 N.L.R.B. No. 40, 92 L.R.R.M. at 1296-97. This problem is compounded by the fact that in many situations supervisor-members have performed some rank-and-file work as a part of their normal duties prior to a strike, and the Board has had to make the difficult determination of whether or not such rank-and-file work was augmented during the strike, and, if not, whether *Florida Power* may nevertheless govern such cases. *Skippy Enterprises, Inc., supra*, 218 N.L.R.B. at 1063-1064; *Associated Food Stores, Inc., supra*, 220 N.L.R.B. at 809-810. The Board's experience in implementing the *Florida Power* distinction has thus clearly proved false the lower court's determination in *Florida Power* that "[t]he dividing line between supervisory and nonsupervisory work in

the present context is sharply defined and easily understood." 487 F.2d at 1157.

Finally, even *Florida Power*'s limited holding deprives employers of what may be their only effective means of ensuring their statutory right to treat supervisors *as* supervisors and to select and to retain loyal and effective collective bargainers and grievance adjusters. The Court suggested that employers could protect these rights by exercising their "option" of requiring supervisors to resign from union membership or of not hiring supervisors who are union members.* 417 U.S. at 812. The present cases clearly demonstrate, however, that neither of these options is realistic and that *Florida Power* is ripe for overruling. Unlike the employers in *Florida Power*, the Networks required their supervisor-members to perform supervisory work during the strike in accordance with the terms of the supervisor-members' personal service contracts. However, the Networks could not require their supervisor-members to resign from the Guild because the Guild refused to allow such resignations.** (A. p. 579.) Moreover, because so many members of management in the entertainment industry retain numerous guild and other union memberships because they may return to writer or other non-management status at some point in the future, the Networks, unlike the employers in *Florida*

*It is the Networks' contention that no such "option" was contemplated by Congress in its 1947 amendments to the Act. In the words of Circuit Judge McKinnon, dissenting from the court of appeals decision in *Florida Power:* "Congress did not give employers the means to *opt* for the undivided loyalty of their supervisors—it guaranteed it itself by enacting sections 2(3) and 14(a)." 487 F.2d at 1177.

**Even in situations where resignation is possible, its effectiveness is greatly undercut by the lack of knowledge on the part of union members of their ability to resign and the legal uncertainty of the limitations which unions may place on resignations. *See generally, Wellington, Union Fines and Workers' Rights,* 85 Yale L.J. 1022 (1976).

Power, could not protect their § 8(b)(1)(B) rights by refusing to hire supervisors who were union members. Due to the nature of the industry, the Networks could not realistically refuse to select individuals who retained some form of Guild membership as § 8(b)(1)(B) representatives or there would be very few qualified persons whom they could so select.

Accordingly, overruling *Florida Power* would allow for an interpretation of § 8(b)(1)(B) which effectuates Congress' resolution of the conflict-of-loyalties problem in a manner which is in harmony with all of the Act's provisions and with "the manifest purpose of the Congress to fashion a coherent national labor policy." *NLRB v. Drivers, Chauffeurs, Helpers Local Union No. 639*, 362 U.S. 274, 292 (1960).

Conclusion.

For the foregoing reasons, the judgment of the court of appeals should be reversed and the cases should be remanded to that Court with directions to enforce the Board's order.

Respectfully submitted,

CHARLES G. BAKALY,
Attorney for Petitioners American Broadcasting Companies, Inc., CBS Inc. and National Broadcasting Company, Inc.

Of Counsel:
O'MELVENY & MYERS,
RICHARD N. FISHER,
GORDON E. KRISCHER,
STEVEN C. BABB,

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